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June 28, 2000

Attn: Hazardous Materials Preemption Docket
Associate Administrator for Hazardous Materials
Safety, Research and Special Program Administration
U.S. Department of Transportation
Washington, DC 20590-001

Re: Preemption Petition of the Kiesel Company regarding Missouri Code of
State Regulations 10 CSR 25-6.23 (2)(A)(10)(H)

Dear Secretary:

Pursuant to 49 U.S.C. § 5125 and 49 C.F.R. Part 107, Subpart C, The Kiesel Company ("Kiesel"), by and through its undersigned counsel, hereby requests that the Secretary of the Department of Transportation decide that a regulation promulgated by the Missouri Department of Natural Resources which prohibits recontainerization at a transfer station (10 CSR 26-6.23(2)(A)(10)(H)) contravenes and is inconsistent with federal law and is therefore preempted under 49 U.S.C. § 5125.

1. **Background:** Kiesel provides a variety of services and is a licensed hazardous waste transporter. Kiesel maintains a rail siding at its facility at Branch Street in the City of St. Louis. Kiesel has been in discussions regarding the use of the rail siding at its facility to provide a transfer point for the off loading of hazardous waste from rail cars to tankers or vacuum trucks for transport to a disposal site in Illinois licensed to receive and dispose of hazardous waste. The transfer of hazardous waste from the rail car to a trailer or a vacuum truck would constitute recontainerization which is prohibited under Missouri regulations.

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2. Regulation at Issue. 10 CSR 25-6.263 (2)(A)(10)(H) provides as follows:

Recontainerization of hazardous waste at a transfer facility is prohibited; however, hazardous waste containers may be over packed to contain leaking or to safeguard against potential leaking. When containers are over packed, the transporter shall affix labels to the over packed container which are identical to the labels on the original shipping container;

The regulation accordingly prohibits recontainerization.

3. Federal Regulations. Federal regulations at 40 C.F.R. § 263.12 authorize the storage of hazardous waste incident to transporting the waste by a hazardous waste transporter for a period of ten days without the necessity for compliance with the stringent rules for a treatment, storage or disposal site. Nothing in the regulation or the regulations promulgated by the Department of Transportation governing transportation of hazardous waste precludes recontainerization at a transfer facility.

The Department has already found an identical regulation for a transfer facility to be in violation of 49 U.S.C. § 5125(b)(1). In New York Department of Environmental Conservation; Requirements on the Transfer and Storage of Hazardous Waste Incidental to Transportation, 60 Fed. Reg. 62527 (December 6, 1995), the Department decided the prohibition of recontainerization for a transfer facility trenches upon regulatory authority committed to the Department of Transportation pursuant to 49 U.S.C. § 5125(b)(1). The Department recognized that the prohibition of recontainerization “applies to the ‘repackaging’ and ‘handling’ of hazardous materials and transportation and is not substantively the same as the requirements in the HMR,” and therefore, 49 U.S.C. § 5125(b)(1)(B) preempts the requirement.

This ruling was reaffirmed in a subsequent decision on reconsideration. New York Department of Environmental Conservation; Requirement on the Transfer and Storage of Hazardous Waste Incidental Transportation, 62 Fed. Reg. 15970 (April 3, 1997). These ruling were recently upheld upon review. State of New York v. United States Department of Transportation, 37 F. Supp.2d 152 (N.D.N.Y. 1999).

The arguments set forth in the Federal Register notices and the District Court opinion apply with full force to the regulation at issue in Missouri. Accordingly, Kiesel incorporates by reference the arguments set forth in those documents as well as the holdings and requests that the Secretary reaffirm those holdings by issuing identical rulings.


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4. Request for Relief. Predicated on the foregoing rulings, Kiesel requests that the Secretary determine that the Missouri regulation is inconsistent with and therefore invalid due to federal preemption. Absent such a ruling, Kiesel will be unable to utilize its rail siding as a transfer facility.

5. Certification. The undersigned hereby certifies that a copy of this letter was sent to Director, Department of Natural Resources, P.O. Box 176, Jefferson City, MO 65101.

If you have any questions regarding this matter or wish to discuss this further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Greenberg', followed by a horizontal line.

Richard Greenberg

REG/baw